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Ontario

RECONSIDERATION DECISION

Before: Chloe Lester, Vice-Chair

Date: January 9, 2020

File: 18-004772/AABS

Case Name: S.S.R v. Unifund Assurance Company

Written Submissions by:

For the Applicant: Sahereh Baghbani, Paralegal

For the Respondent: Geoffrey Keating, Counsel

OVERVIEW

[1] The respondent, Unifund Assurance Company, asks for a reconsideration of the Tribunal's[1] amended decision released on June 27, 2019 where the applicant was not statute barred from proceeding to the hearing, removed from the Minor Injury Guideline ("MIG"), entitled to $200 for clinical notes and records, a treatment plan for various physical services and non-earner benefit.

[2] The respondent makes the request pursuant to Rule 18.2 (b) of the Licence Appeal Tribunal (LAT) Rules of Practice and Procedure Version 1 (February 7, 2019) (the "Tribunal's Rules"). The respondent submits the Tribunal erred in fact and/or law in several ways as discussed in detail below.

[3] Pursuant to s. 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, I have been delegated responsibility to decide this matter in accordance with the applicable rules of the Tribunal.

ISSUES IN DISPUTE

[4] The respondent alleges the Tribunal's decision meets the reconsideration criteria because the decision erred in the following ways:

(1) Awarding expenses for clinical notes and records.

(2) By concluding s. 55(1)2 does not support barring an appeal that has been lawfully made and has actually begun to proceed and concluding that the applicant was not required to attend the insurer's examinations.

(3) By concluding the applicant suffers from chronic pain.

(4) By concluding the applicant is entitled to the treatment plan for chiropractic services.

(5) By concluding the applicant is entitled to non-earner benefits and the time period for which the benefit begins to be payable.

RESULT

[5] The reconsideration is granted in part.

ANALYSIS

Expenses Awarded for Clinical Notes and Records

[6] In its decision, the Tribunal, awarded $200 for clinical notes and records.

[1] Tribunals Ontario, Safety, Licensing Appeals and Standards Division, Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal")

[7] The respondent argues that the adjudicator erred by awarding $200 for expenses relating to clinical notes and records on the basis the respondent did not make submissions on this issue. The respondent argues that the *Schedule* does not entitle an injured party to this expense.

[8] The applicant submits the adjudicator erred in his wording and should have written that the expenses related to $200 for completing a Disability Certificate (OCF-3). This was an expense already approved by the respondent and was cited in the respondent's submissions.

[9] In review of the case conference report, the issues to be decided at the hearing was $150 for expenses for clinical notes and records and $200 for completing an OCF-3. The applicant claims the $150 in expenses for clinical notes and records were already approved by the respondent prior to the hearing and that is why neither party included them in their submissions. The only issue in dispute was the cost of the OCF-3. Upon receipt of the applicant's hearing submissions, the respondent acknowledged that the applicant is entitled to the expense. Therefore, it appears both issues were resolved prior to the decision being released.

[10] Since both issues were resolved, the order to recover the expenses of $200 for clinical notes and records was made in error and should not have been included in the decision. I order the decision relating to the $200 for clinical notes be removed from the decision.

Section 55(1)2 and Whether the Applicant was Obligated to Attend the IE's

[11] The Tribunal decided that the applicant was not precluded from proceeding to a hearing on the merits because the first time the respondent raised this preliminary issue was in their responding submissions to the hearing and because there was a significant delay in requesting these examinations. Since the examinations were scheduled to proceed after the applicant had submitted their written arguments on the issues in dispute, the Tribunal concluded that it felt it had no authority to preclude the applicant from proceeding to a hearing on the basis that the hearing had already commenced.

[12] The respondent argues that the decision to allow the application to continue on the issue of the MIG was in error in two ways. One being that the adjudicator erred by deciding that once an appeal has been lawfully made and had begun to proceed, it had no authority to bar the applicant from proceeding. The respondent relies on *17-002973 v. Aviva Insurance Company* to support their position that the Tribunal does have such authority. Secondly, by also deciding the applicant was not obligated to attend because of the long delay in asking for the examinations.

[13] The applicant argues that the decision in *17-002973 v. Aviva Insurance Company* should be differentiated based on the facts of this case. The

applicant also argues that, in this case, there was a significant delay in requesting the examinations as they were requested almost a year after the determinations were made on the issues in dispute.

[14] Upon review of the submissions and evidence from the hearing, the applicant can only be precluded from proceeding to a hearing if the examinations being requested are on the issue(s) in dispute for the hearing. The Notice of Examination dated December 19, 2018 requests the applicant to attend in-person examinations for the purpose of medical and rehabilitations benefits. It does not specify which benefits or if it is on the applicability of the MIG. Therefore, I cannot conclude that the examinations were on any of the issues in dispute before the Tribunal and therefore, on that basis alone, the applicant would not be precluded from proceeding to a hearing.

[15] Also, the case law being referred to by the respondent can be differentiated on the basis of when the proceedings began. In that case, the applicant was precluded from proceeding before the hearing had commenced. In this case, the hearing had commenced, and written submissions had already been submitted. It was only in the respondent's responding submissions that it first raised its position that the applicant should be precluded from proceeding to a hearing on the issues. The respondent argues the reason for the delay of the examinations was because it had received medical documentation from the applicant in their case conference summary. Medical documentation is not a prerequisite to conducting an examination for determining entitlement to a benefit. The respondent had already denied the benefits for other reasons and the Application for Dispute Resolution was filed on that basis. I find no error in the way the adjudicator supported his decision to allow the hearing to continue.

Concluding the Applicant Suffers from Chronic Pain

[16] The Tribunal's decision found that the applicant suffers from chronic pain and that the applicant would not be able to achieve maximal medical recovery within MIG limits.

[17] The respondent argues that the Tribunal erred in finding that the applicant suffered from chronic pain because it failed to take into consideration its submissions that the doctor who opined the applicant suffered from chronic pain, Dr. Lam, did not review the records from the family physician and by stating that the applicant's medical evidence was uncontroverted by the respondent.

[18] The applicant argues that the respondent is bringing forth new arguments in asking to Tribunal to re-weigh the evidence. The applicant argues that the respondent claims it produced medical evidence to refute the chronic pain diagnosis but, in their submissions, failed to outline what the evidence was. The applicant also argues that the records from the family physician support the diagnosis of chronic pain by making referrals to other specialists.

[19] In review of the respondent's submissions, it mainly argues that the report of Dr. Lam should be discredited on the basis that it relied on the applicant's self-reports, conducted no testing and failed to take into consideration the family physician's records that allegedly contradict those self-reports. In review of the Tribunals' decision, the adjudicator provided a number of reasons why Dr. Lam's report supported the applicant's position that he should not be classified in the MIG. The fact that Dr. Lam did not review the records from the family physician is not reason enough to discredit his medical opinion. The adjudicator was satisfied that the doctor had reviewed enough medical documentation and conducted testing to support the conclusion.

[20] Absent of a significant error, the respondent is asking me to re-weigh the evidence, which I decline to do. The adjudicator carefully reviewed and weighed all the medical evidence and made clear findings based on a balance of probabilities. In assessing the evidence, he found some evidence more persuasive than others and gave weight to the evidence accordingly. It is the role of the adjudicator hearing the merits of an application to consider and weigh the evidence presented and apply his findings of fact to the law. The adjudicator was within his discretion in relying on Dr. Lam's report in agreeing with the applicant's position that chronic pain was established thereby warranting removal from the MIG. I am not satisfied that the adjudicator's determination involved any error.

The Determination of the Treatment Plan

[21] The adjudicator in its decision found that the applicant was entitled to the treatment plan for physiotherapy, chiropractic and exercise services because it was similar to the treatment being recommended by Dr. Lam for improving chronic pain.

[22] The respondent argues that the adjudicator's reasoning in approving the treatment plan fails to take into consideration the accepted test for determining the reasonableness or necessity of the plan. Mainly, whether the treatment being recommended will or has met the goals of treatment.

[23] Based on the submissions of the respondent, I fail to see how the adjudicator made an error that warrants reconsideration. The adjudicator in its decision reasons why it thought the applicant met his onus and found the treatment plan reasonable and necessary. There are many reasons why a treatment plan may be considered reasonable and necessary. The one articulated by the respondent is just one of those reasons. The fact that the argument put forward by the respondent was not a main factor in the adjudicator's decision does not constitute an error. Again, the respondent is asking me to re-weigh the evidence and make a determination in favour of its arguments. This is not sufficient to warrant reconsideration. A request for reconsideration is not an opportunity to have a different adjudicator rehear the evidence or to re-litigate the matter.

Issue of Non-Earner Benefit and When the Entitlement to the Benefit May Begin

[24] The Tribunal's decision found that the applicant was entitled to non-earner benefits ("NEB") because the adjudicator found he had a complete inability to carry on normal life. The adjudicator based his decision on Dr. Lam's report that details the activities that applicant was no longer capable of engaging in which supported the submissions of the applicant and the requirements necessary to meet the test for the benefit. The applicant claimed he was not able to complete his adult education courses, social and recreational pursuits and housekeeping. On that basis, the adjudicator concluded the applicant met the test for NEB.

[25] The respondent argues that there is no corroborating evidence to support the conclusion in Dr. Lam's report that the applicant is no longer capable of completing the activities of daily living.

[26] This argument was contemplated in the adjudicator's decision and rejected. The decision found that Dr. Lam's clinical testing, observations and beliefs of the applicant's self-reports were enough to conclude the report was credible and sufficient to support the NEB test.

[27] The respondent argues that the report itself does not comment on the legal test for non-earner benefit [2] and the Disability Certificate (OCF-3) does not support entitlement to the benefit and, therefore, there is no medical evidence to prove the applicant is entitled to the benefit.

[28] The fact that a report does not comment on a legal test does not in itself discredit the evidence being relied upon. Also, the fact that the Disability Certificate does not support entitlement does not disentitle the benefit. The *Schedule* only requires that the OCF-3 is completed in order to be entitled to the benefit, which it was.[3] It is up to the adjudicator to decide whether the applicant meets the legal test. One of the roles of a medical report is to conduct testing, determine if a diagnosis is warranted, and possibly recommend a course of treatment or determine whether the treatment being recommended supports the diagnosis. That being said, the adjudicator relied upon the report as evidence to support that the applicant had met his onus to establish entitlement to NEBs. I see no error in the Tribunal's decision and decline to reconsider it.

[29] The respondent also argues that the adjudicator erred when it awarded the NEB to be paid four weeks post accident instead of 6 months post accident in accordance with the *Schedule* and the date of the accident, being May 6, 2016.

[30] According to the application, case conference report and numerous other documents, the date of the accident was July 5, 2016. This date may be significant as the *Schedule* amended the provisions on NEBs as of June 1, 2016. As per the transitional rules listed in s. 2(1.2), the previous *Schedule*

[2] The respondent relies on *17-003732 v. Royal Sun Alliance* 2018 CanLII 39449 (ON LAT)
[3] Section 36 (3)

would apply only if the applicant was still in an active insurance contract outlining the pre-June 1, 2016 entitlements. That would mean entitlement to NEBs could not begin to be payable until 6 months post accident. If the insurance contract was renewed between June 1, 2016 and July 5, 2016, then the new *Schedule* would apply and payments for non-earner benefits would begin 4 weeks post-accident.

[31] The Tribunal's decision also entitled the applicant to the benefit beginning 4 weeks post accident because, in its view, the respondent failed to issue a proper denial within the ten days as required under s. 36(6) the *Schedule.*

[32] These may be errors if the applicant was subject to the previous *Schedule*. The NEB cannot be awarded before entitlement may begin.

[33] In this case, the respondent later confirmed that the date of the accident was in fact July 5, 2016 and the policy was renewed just prior to the *Schedule* changes on May 6, 2016.

[34] Therefore, in accordance with the policy renewal date, the pre-June 1, 2016 Schedule applies, and the entitlement to the benefit may not begin until 6 months post accident. Based on this information, an error in fact was committed and the order is amended to reflect that the entitlement to NEB cannot begin until January 6, 2017.

CONCLUSION

[35] The threshold for reconsideration is high. Under Rule 18.2(b), reconsideration is only warranted where the Tribunal made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made. It is not an opportunity to re-argue the evidence presented at the hearing. In this instance, rather than pointing to an error of fact or law, the respondent requests that I revisit its original arguments, re-weigh the evidence and come to a conclusion which favours its position. Thus, the respondent has failed to meet the test for reconsideration set out in Rule 18.2(b) for many of its arguments.

[36] As indicated above, the Tribunal erred in determining an issue that had already resolved prior to the hearing and for that reason, the order entitling payment of the medical records is expunged. Also, because there was some confusion regarding which *Schedule* applies, the Tribunal's decision entitled the applicant to NEB earlier than the Schedule allowed. For that reason, an error of fact was made, and the decision is amended to reflect that entitlement to NEB may begin on January 6, 2017.

[37] I dismiss the respondent's request for reconsideration on all remaining grounds.

[38] The request for reconsideration is granted in part.

Released: January 9, 2020

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Chloe Lester
Vice-Chair